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NTSB Order No. EA-4866

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 28th day of November, 2000

_____	)	
JANE F. GARVEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	
v.	)	Dockets SE-15135
	)	and SE-15136
	)	
MARY C. MORRIS and	)	
GILBERT W. WALLACE,	)	
	)	
Respondents.	)	
_____	)	

**OPINION AND ORDER**

The Administrator has appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., issued at the conclusion of a two-day evidentiary hearing held on June 2 and 3, 1998.<sup>1</sup> By that decision, the law judge overturned orders of the Administrator alleging that respondents Morris and Wallace had violated sections 91.13(a) and 121.631(c) of the Federal Aviation

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<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

Regulations ("FAR"), 14 CFR Parts 91 and 121.<sup>2</sup> For the reasons discussed below, we have decided to solicit the views of the parties on an issue that we believe is important to a proper resolution of this case. Appropriate further action will be taken once those views have been received and evaluated.

The Administrator alleged, with respect to respondent Morris, among other facts and circumstances, the following in her December 18, 1997 order of suspension<sup>3</sup>:

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<sup>2</sup>FAR sections 91.13(a) and 121.631(c) provide as follows:

**§ 91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

**§ 121.631 Original dispatch or flight release, redispach or amendment of dispatch or flight release.**

\* \* \* \* \*

(c) No person may change an original destination or alternate airport that is specified in the original dispatch or flight release to another airport while the aircraft is en route unless the other airport is authorized for that type of aircraft and the appropriate requirements of sections 121.593 through 121.661 and 121.173 are met at the time of redispach or amendment of the flight release.

<sup>3</sup>The order suspending respondent Wallace's certificate alleged the same facts, except that paragraph 1 refers to respondent Wallace's Airline Transport Pilot Certificate Number (248722207); paragraph 2 refers to respondent Wallace as the second in command; a different paragraph 4 is inserted, alleging that he shares with the pilot in command the responsibility for the safe outcome of the operation and compliance with the FAR; paragraphs 5 through 28 are the same as paragraphs 6 through 29 in respondent Morris' complaint, e.g., Wallace 7 corresponds to Morris 8; paragraphs 12 and 13 add the language "or agreed with the pilot in command's decision"; no allegations corresponding to paragraphs 28 and 29 of the Morris complaint are alleged; and paragraph 32 corresponds to paragraph 30 of the Morris complaint. Additionally, the following allegations are alleged in respondent

1. You are the holder of Airline Transport Pilot Certificate Number 497549464.

2. On or about March 3, 1997, you were the pilot in command of USAir Flight 1186, a Boeing 737, carrying passengers and property from West Palm Beach, Florida, with an intended destination of LaGuardia Airport, New York City, New York.<sup>4</sup>

3. The flight described above was being operated under Part 121 of the Federal Aviation Regulations (14 CFR Part 121).

4. The forecast at LaGuardia Airport for the flight described above did not call for a ceiling of at least 2,000 feet above the airport elevation and visibility of at least 3 miles for the period including one hour before and one hour after the estimated time of arrival.

5. The alternates set forth in the dispatch release for the flight described above were Albany County Airport, Albany, New York, and Bradley Field, Windsor Locks (Hartford), Connecticut.

6. During the approach of USAir Flight 1186 to LaGuardia Airport at approximately 3:15 p.m. Eastern Standard Time (2015 UTC), on or about March 3, 1997, the weather deteriorated below the minimum visibility for landing allowed under USAir's operations specifications and the instrument approach procedure requirements for Runway 4 at LaGuardia Airport.

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(..continued)

Wallace's complaint:

29. As an operating crew member, you are responsible to advise the pilot in command of any potential or actual emergency situation and provide input until the safety of flight issues are resolved.

30. Diverting to an airport not listed in the dispatch release when it does not have the minimum weather requirements for an alternate under USAir's operations specifications creates a potential emergency because of the risks of running low on fuel due to holding, missed approaches, or further diversion, or of landing in conditions of unacceptably low ceilings or visibility.

<sup>4</sup>During the pendency of this proceeding USAir changed its name to US Airways.

7. You elected to divert to Newark International Airport, Newark, when it appeared you would not be able to land at LaGuardia Airport.

8. When you informed air traffic control of your decision to divert to Newark, you were told to expect approximately 50 miles of vectors to the final approach at Newark, which you acknowledged and accepted.

9. The last actual weather observation for Newark Airport immediately prior to your decision to divert to Newark was issued at 2:51 p.m. (1951 UTC) and reported visibility of  $\frac{1}{2}$  mile in snow and fog.

10. A weather observation issued for Newark Airport at 3:22 p.m. (2022 UTC) reported the visibility as  $\frac{1}{4}$  mile in snow and fog.

11. The published minimum visibility for a Category I instrument landing system (ILS) approach to the runway in use at Newark, Runway 4R, in effect at all times pertinent hereto was at least  $\frac{1}{2}$  mile or a runway visual range of 1800 feet.

12. While you were being vectored by air traffic control for an approach to Newark Airport, you decided that the weather conditions for landing at Newark were below the minimum requirements that you could accept.

13. Instead of continuing to Newark or another alternate airport, you decided at approximately 3:35 p.m. (2035 UTC) to divert to John F. Kennedy International Airport, New York, and informed air traffic control of your change in plans.

14. The last actual weather observation for Kennedy Airport immediately prior to your decision to divert to that airport was issued at 3:22 p.m. (2022 UTC) and reported the visibility as  $\frac{1}{4}$  mile in heavy snow and fog.

15. The published minimum visibility for a Category I approach to the runway in use at Kennedy, Runway 4R, in effect at all times pertinent hereto was at least  $\frac{3}{8}$  mile or a runway visual range of 1800 feet.

16. As air traffic control positioned you for an approach into Kennedy, you were told that you were approximately number 12 for landing at Kennedy.

17. When air traffic control did not give you an expedited approach into Kennedy, you declared "less than minimum fuel."

18. In response to your declaration of "less than minimum fuel," air traffic control used emergency procedures to give you expedited handling and redirected other aircraft landing at Kennedy to accommodate you.

19. The forecast for both Bradley Field and Albany for the period pertinent to your operation of USAir Flight 1186 was clear skies and 10 miles visibility.

20. The actual weather observation for Bradley Field at 2:51 p.m. Eastern Standard Time (1951 UTC) reported scattered clouds at 10,000 feet and 10 miles visibility.

21. The actual weather observation for Albany County Airport at 2:56 p.m. Eastern Standard Time (1956 UTC) reported overcast skies at 18,000 feet and 10 miles visibility.

22. The visibility at Albany County Airport and Bradley Field remained at 10 miles for at least 2 hours after the observation made at 2:56 p.m., and no clouds were reported below 7,000 feet.

23. The distance from New York, LaGuardia Airport, to Albany County Airport is approximately 140 miles, requiring approximately 29 minutes flying time and 3100 pounds of fuel.

24. The distance from New York, LaGuardia Airport, to Bradley Field is approximately 96 miles, requiring approximately 21 minutes flying time and 2300 pounds of fuel.

25. At the time you decided to divert to Newark Airport, the aircraft had approximately 8500 pounds of fuel remaining on board.

26. USAir is prohibited, pursuant to USAir's operations specifications, from using as an alternate any airport (having at least two operational navigational facilities) with a visibility less than the sum of one half mile added to the higher authorized Category I landing minimum of the two approaches used.

27. Neither Newark nor Kennedy was an acceptable alternate

airport for USAir Flight 1168 under USAir's operations specifications at the time you decided to divert from your original destination of LaGuardia Airport to either of those airports.

28. The USAir Flight Operations Manual requires the Captain to coordinate any change in the destination or alternate destination airport with the flight dispatcher unless the Captain is exercising emergency authority.

29. You did not coordinate your decision to divert to Newark or to Kennedy with any USAir flight dispatcher.

30. By diverting to airports having marginal or below minimum weather conditions instead of proceeding to an alternate set forth in the dispatch release that had favorable weather conditions, you operated an aircraft in a careless or reckless manner so as to endanger the lives and property of others.

The evidence adduced at the hearing focused largely on testimony concerning respondents' aircraft's estimated remaining fuel at various points, mostly after it was in the New York City area, and whether the quantity on hand satisfied minimum fuel prerequisites for transit to one or the other alternates in their flight plan.

The Administrator argues that the initial decision's dismissal of her charges is contrary to the weight of the reliable, probative, and substantial evidence. Our own preliminary review of the record reveals that, as the Administrator maintains, there may well be flaws in the law judge's evaluation of the parties' evidence as to whether the respondents' aircraft, at the time they reported a fuel emergency in order to land out of turn at Kennedy, could have flown to either of the originally designated alternates, consistent with

the regulatory requirements for fuel reserves referenced in FAR section 121.631(c).<sup>5</sup> Notwithstanding that possibility, we think an important issue in this case is one the parties have only tangentially addressed: namely, the impact of the respondents' notification to ATC of a fuel emergency on their position here that none in fact existed.

This is not a case in which a crew has declared a fuel emergency<sup>6</sup> and later discovered that they were mistaken. Rather, it is a case in which the flight crew staunchly denies that it had a fuel emergency, but nevertheless advised ATC that it did in order to receive priority handling, because they "just did not want to take any delays" that *might* require them to use reserves that they otherwise needed to reach their alternates. In these circumstances, the respondents can succeed on their appeal to the

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<sup>5</sup>At the same time, while the careless or reckless charge could be established by proof that the aircraft did not have the fuel reserves necessary to reach the alternates, we are far from convinced, on the record before us, that such a charge could be sustained if the only issue here were the propriety of the respondents' decision to land at an airport that posed weather-related operational concerns (e.g., visibility and traction) that the alternates did not. Stated differently, we do not think that the availability of better weather elsewhere is sufficient in itself to justify subjecting a pilot's choice of a landing site to a carelessness analysis. FAR section 91.13(a) speaks to careless or reckless operations, not questionable decisionmaking. The Administrator does not suggest that the respondents' actual landing at Kennedy endangered their passengers or aircraft. The Administrator, of course, is not free to give pilots the discretion, within the parameters of their training and equipment, to land in a snowstorm or other problematic weather and then prosecute them if they do.

<sup>6</sup>Specifically, respondent Morris advised ATC that her

Board from the Administrator's suspension order only if the evidence shows that they lied to ATC (*i.e.*, if it shows that when they declared less than minimum fuel they actually had enough fuel to reach Hartford or Albany with adequate reserves to meet the requirements of FAR sections 121.593 through 121.661 and 121.671). We question whether providing the respondents with the opportunity to so demonstrate advances the interests of air safety or represents an appropriate exercise of our adjudicatory resources.

In view of this unusual, perhaps unprecedented, state of affairs, we have decided to postpone further action in this matter until we have heard from the parties on our tentative judgment that the respondents should not be permitted to advance on an appeal to the Board a position that is contrary to information provided to air traffic control in connection with an air carrier operation.

**ACCORDINGLY, IT IS ORDERED THAT:**

The parties are hereby given 30 days from the date of service of this opinion and order to file such comments as they wish to have considered on the issues discussed above.

HALL, Acting Chairman, HAMMERSCHMIDT, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order. Member GOGLIA did not concur.

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(..continued)  
aircraft had less than minimum fuel remaining.